

**MARK L. MORALES**  
Claimant

**TRANSWOOD INC.**  
Respondent

**SPARTA INSURANCE COMPANY**  
Insurance Carrier

## ORDER

On May 26, 2016, the Board entered an Order modifying the ALJ's Award, finding claimant sustained a 22 percent permanent functional impairment, and awarding permanent partial disability benefits (PPD) based on a 71.5 percent work disability. The Board also ordered respondent to pay medical bills to Neosho Regional Medical Center, Chanute Radiology and St. Luke's Health Systems. Respondent filed an appeal to the Kansas Court of Appeals. That appeal is pending.

On July 7, 2016, respondent filed a motion requesting the Board to “stay the proceedings through the pendency of the review by the Appellate Court.” Respondent asserted the compensation disputed in the appeal is in excess of \$90,000, and the Kansas Workers Compensation Fund (Fund) could be liable to reimburse respondent a substantial sum should respondent prevail in its appeal. Claimant questions the Board’s jurisdiction to consider respondent’s motion during the pendency of the Court of Appeals review.

Respondent asserts: “[r]espondents request a stay of **only** the portions of the Board’s Order involving payment of the disputed medical bills and the permanent impairment amount in excess of the permanent partial impairment rating of claimant’s treating physician, William H. Barkman, MD.” (emphasis in original)

Claimant's attorney requests the Board deny the motion for stay and award him attorneys fees pursuant to K.S.A. 44-536(g).

**PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 77-616 provides:

(a) Unless precluded by law, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.

(b) A party may file a motion in the reviewing court, during the pendency of judicial review, seeking interlocutory review of the agency's action on an application for stay or other temporary remedies.

(c) If the agency has found that its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety or welfare, the court may not grant relief unless it finds that:

(1) The applicant is likely to prevail when the court finally disposes of the matter;

(2) without relief the applicant will suffer irreparable injury;

(3) the grant of relief to the applicant will not substantially harm other parties to the proceedings; and

(4) the threat to the public health, safety or welfare relied on by the agency is not sufficiently serious to justify the agency's action in the circumstances.

(d) If subsection (c) does not apply, the court shall grant relief if it finds, in its independent judgment, that the agency's action on the application for stay or other temporary remedies was unreasonable in the circumstances.

(e) If the court determines that relief should be granted from the agency's action on an application for stay or other temporary remedies, the court may remand the matter to the agency with directions to deny a stay, to grant a stay on appropriate terms or to grant other temporary remedies, or the court may issue an order denying a stay, granting a stay on appropriate terms or granting other temporary remedies. As used in this subsection, "appropriate terms" may include requirement of a bond.

(f) Except as otherwise authorized by rule of the supreme court, the court shall not issue any *ex parte* order pursuant to this section.

(g) This section shall not apply to proceedings under K.S.A. 66-118g through 66-118k, and amendments thereto.

K.S.A. 44-556(b) provides:

Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's

decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

The Board has customarily held that K.S.A. 44-556(b) contained an automatic stay provision for the payment of compensation pending an appeal to the Kansas Court of Appeals, except the weekly benefits provided for in that provision. However, the Court of Appeals, in *Nuessen*,<sup>1</sup> determined that in modifying the Kansas Workers Compensation Act (Act) in 1993, the legislature intended to remove that automatic stay. The *Nuessen* Court quoted the Kansas Supreme Court in *Acosta*<sup>2</sup>:

“is the declared public policy of the state that compensation awards shall be promptly paid, and [K.S.A. 44-512a] is the means selected by the Legislature to insure their enforcement and applies to all awards and judgments without the slightest qualification.”<sup>3</sup>

The Board must determine whether respondent's request for a stay should be granted. The Board has jurisdiction to rule on that request pursuant to K.S.A. 77-616.<sup>4</sup> That statute does not require an agency to grant a stay, nor does it require a stay be denied. That determination is within the discretion of the agency.

The Board finds that, while it can consider issues dealing with a substantial threat to the public health, safety or welfare, the Board, in its discretion, is not required to consider those issues. K.S.A. 77-616(a) places limitations on the Board only when a stay is “precluded by law.” There is no statutory preclusion against a stay.

In support of its motion to stay, respondent argues: (1) respondent is seeking judicial review of the Board's May 26, 2016, Order; (2) pursuant to *Nuessen*, K.S.A. 77-616 applies to the Board's consideration of respondent's motion to stay; (3) no law in this claim precludes the granting of a stay; (4) no issue in this claim institutes a substantial threat to public health, safety or welfare; (5) respondent submits the Board misapplied the law as it relates to the issues of task loss and outstanding medical bills, and that, if respondent is correct, the amount of compensation awarded will be greatly impacted; and (6) respondent does not seek to avoid payment of all benefits by way of its motion, but rather appeals to the Board to exercise its authority to grant a stay on appropriate terms pursuant to K.S.A. 77-616.

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<sup>1</sup> *Nuessen v. Sutherlands*, 51 Kan. App. 2d 616, 352 P. 3d 587 (2015).

<sup>2</sup> *Acosta v. National Beef Packing Co.*, 273 Kan. 385, 44 P. 3d 330 (2002).

<sup>3</sup> *Id.* at 398-399.

<sup>4</sup> See *Eder v. Hendrick Toyota*, No. 114,824 (Kansas Court of Appeals unpublished Order filed Mar. 29, 2016).

The Board finds respondent's motion to stay proceedings should be denied. Respondent provides insufficient reason why, under the circumstances of this claim, its motion should be granted. The Board disagrees with respondent that the Board misapplied the law. All the findings in the Board's May 16, 2016, Order are consistent with the Act and supported by a preponderance of the credible evidence. Specifically, the Board's decision regarding task loss and the payment of outstanding medical bills involved no misapplication of the Act.

In its brief, respondent expresses concern that the Fund would be unduly burdened by respondents seeking reimbursement from the Fund if successful in their appeals to the appellate courts, and if stays are not granted in those appeals.<sup>5</sup> The Board finds no merit in that argument.

Respondent provides the Board with insufficient rationale to grant its motion. Accordingly, the Board, in the exercise of its discretion, denies respondent's motion for a stay.

Claimant's counsel requests the Board award him attorneys fees pursuant to K.S.A. 44-536(g). Such requests must be submitted to the ALJ, not the Board. The ALJ's decision on such a request would then be subject to Board review.<sup>6</sup>

### **CONCLUSIONS**

1. Respondent's motion to stay proceedings pending appellate review is denied.
2. The request of claimant's counsel that the Board award him attorneys fees is denied.

### **DECISION**

**WHEREFORE**, the Board finds respondent's motion for stay and the request of claimant's counsel for the Board to award him K.S.A. 44-536(g) attorneys fees are both denied.

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<sup>5</sup> See K.S.A. 44-556(d).

<sup>6</sup> See *Grissom v. TSW Products Co., Inc.*, No. 1,045,317, 2014 WL 517209 (Kan. WCAB Jan. 2, 2014); *Hernandez v. State of Kansas*, No. 1,039,320, 2010 WL 4009112 (Kan. WCAB Sept. 10, 2010).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2016.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Honorable Bruce E. Moore, Administrative Law Judge